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July 16, 1999

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BY HAND
Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW, Room TWB204
Washington, D.C. 20554

Re: ***PR Docket No. 92-235***
Petition for Partial Reconsideration

Dear Ms. Salas:

Transmitted herewith, on behalf of Forest Industries Telecommunications, are original and 4 copies of its *Petition for Partial Reconsideration* in the above captioned docket.

Should any questions arise concerning the matter, please communicate with me.

Very truly yours,

Paul J. Feldman

PF:jpg
Enclosure

No. of Copies rec'd 0+4
List A B C D E

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to	)	
Revise the Private Land Mobile Radio	)	
Services and Modify the Policies	)	
Governing Them.	)	
	)	PR Docket No.92-235
and	)	
	)	
Examination of Exclusivity and	)	
Frequency Assignment Policies of	)	
the Private Land Mobile Radio Services	)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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July 16, 1999

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SUMMARY

Forest Industries Telecommunications ("FIT") seeks reconsideration of that part of the Second Memorandum Opinion and Order ("*Second MO&O*") in this proceeding which amends Section 90.35(b) of the Commission's Rules to designate the Petroleum and Power frequency coordinators as the mandatory coordinator(s) for the frequencies in the 150-173 and 450-470 MHZ band which were formerly shared by the former Power, Petroleum, and the Forest Products Radio Services, prior to the consolidation of the private land mobile radio services by the Commission's Second Report and Order in this proceeding. As a result of the revision to Section 90.35(b), the Commission effectively revoked FIT's authority to coordinate practically all of the frequencies FIT has coordinated for its constituent members in the forest products industry for over half a century. Reconsideration of the Commission's revision of Section 90.35(b) should be granted because the revision was 1) arbitrary and enacted without proper notice; 2) unnecessary to accomplish the goal of protecting petroleum, power and railroad land mobile systems, in light of the availability of other less extreme alternatives; 3) inconsistent with the stated Commission goal of providing competition in the coordination of shared frequencies, and; 4) harmful to the interests of the forest products industry, to FIT, and to FIT's members.

The Commission's revision of Section 90.35(b) was unreasonable and unsupported by the record. No party sought the exclusive coordination rights to the frequencies at issue: the only pertinent proposal before the Commission was the American Petroleum Institute petition for reconsideration, which merely sought the right

to concur on coordination of proposals that impinged on a contour of an existing petroleum user. The Commission's rejection of that proposal, which would have accommodated the needs of the petroleum industry, was unreasonable. The Commission rejected API's proposal not because it was impractical, opposed, or inconsistent with the public interest but because, according to the Commission, "...the issue of whether to provide protected contours (i.e. exclusivity) to Part 90 licensees generally is the subject of another aspect of the proceeding...." However, API did not propose protected service contours for the purposes of exclusivity. It merely proposed the use of service and interfering contours for the sole purpose of determining whether the concurrence of the petroleum coordinator should be required. Thus, the reason given by the Commission for rejecting the API proposed alternative is not logical or relevant.

FIT thus proposes that the Commission reconsider its action, and adopt the API concurrence proposal, along with a prior notification requirement that would further protect Petroleum, Power and Railroad Radio Service frequencies, without harming the interests of the forest products industry: for users who seek to coordinate a facility using a frequency at issue herein, the coordinator would be required to provide 10 days notice to the UTC, API or AAR respectively, prior to filing the application at the FCC. The prior notification must contain all relevant coordination information. Then, if the UTC, API or AAR believes that a proposal will interfere with an existing power, petroleum or railroad user, the coordinators can work together to resolve the matter. If the matter cannot be resolved between the coordinators, then the coordinator filing the application with the Commission must state that fact in the application.

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them.	)	
	)	PR Docket No.92-235
and	)	
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Forest Industries Telecommunications ("FIT")[1], by counsel and pursuant to Section 1.429(k) of the Commission's Rules, hereby seeks reconsideration of that part of the Second Memorandum Opinion and Order ("*Second MO&O*"), released in the above-referenced proceeding on April 13, 1999, FCC 99-68,[2] which amends Section

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[1]FIT is a trade association representing the land mobile communications interests of the forest products industry and a certified frequency coordinator. It had been coordinating frequencies for that industry for over fifty years and it is now one of the coordinators of the frequencies in the industrial/business pool. The interests of FIT and its constituent members are directly affected by this proceeding, and FIT previously filed comments in this proceeding.

[2]The *Second MO&O* was published in the *Federal Register* on July 6, 1999, 64 FR 36258.

90.35(b) of the Commission's Rules to designate the Petroleum and Power frequency coordinators as the mandatory coordinator(s) for the frequencies in the 150-173 and 450-470 MHZ band which were shared by the former Power, Petroleum, and the Forest Products Radio Services[3], prior to the consolidation of the private land mobile radio services by the Commission's Second Report and Order in this proceeding.[4] Those frequencies are described in Instruction No. 4, Appendix C, to the *Second MO&O*, on page 38, and are listed on pages 39 to 46.

Reconsideration of the Commission's revision of Section 90.35(b) should be granted[5] because the revision was 1) arbitrary and enacted without proper notice; 2) unnecessary to accomplish the goal of protecting petroleum, power and railroad land mobile systems, in light of the availability of other less extreme alternatives; 3) inconsistent with the stated Commission goal of providing competition in the

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[3]See frequency tables in former Sections 90.63(e), 90.65(b) and 90.67(b), 47 CFR 90.63(c), 90.65(b) and 90.67(b) (1996). FIT directs its petition to the Commission's decision concerning the frequencies previously shared by the former Power, Forest Products and Petroleum Radio Service. The decision also includes frequencies previously shared by the former Manufacturers Radio Service, the former Railroad Radio Service and by other former land transportation services, as well as frequencies previously allocated in the former Automobile Emergency Radio Service. Although FIT is concerned about and will be adversely affected by the entire decision in the *Second MO&O* to change the coordination requirements of Section 90.35(b), this Petition is directed to that aspect of the decision which affects coordination of the frequencies the forest products industry shared with the former Petroleum and Power Radio Services because that part of the decision will have the most immediate and most harmful adverse effect on FIT and on its constituents.

[4]*Second Report and Order*, PR Dkt 90-235, 12 FCC Rcd 14307 (1997).

[5]Although the *Second MO&O* disposed petitions for reconsideration, it is itself subject to reconsideration because it modified rules adopted in the *Second Report and Order*. See Section 1.429(i) of the Commission's Rules.

coordination of shared frequencies, and; 4) harmful to the interests of the forest products industry, to FIT, and to FIT's members. In support hereof, the following is shown.

I. Background

In its *Second Report and Order* in this proceeding, the Commission designated the Power coordinator as the mandatory exclusive coordinator for the frequencies previously allocated exclusively to the former Power Radio Service in the 150-173 and 450-470 MHZ bands, the former Railroad coordinator for the frequencies in those bands previously exclusively allocated to the former Railroad Radio Service, and the Petroleum coordinator for the frequencies in those bands previously allocated exclusively to the Petroleum Radio Service[6]. The American Petroleum Institute ("API") sought reconsideration of that decision and proposed a change to require concurrence by the Petroleum coordinator of applications proposing assignment of previously shared frequencies occupied in the area by existing petroleum land mobile systems if the proposed non-petroleum system would likely interfere with existing, co-channel petroleum systems[7]. FIT supported API's proposal, agreeing with API that existing

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[6]*Second Report and Order*, at 14330.

[7]See API Petition for Reconsideration addressed to the *Second Report and Order*, filed on May 19, 1997, pp. 6-8. API proposed that petroleum industry concurrence be required for the grant of any application that seeks authority to share any channel previously allocated to the former Petroleum Radio Service in which the applicant's system would infringe on the existing system in excess of the following values:

> For UHF systems operating in the band 450-470 MHZ, an applicant's 21 dBu contour may not impinge upon the 39 dBu contour of

systems should receive the protection against potential interference API had proposed[8]. Neither API, UTC nor AAR requested expansion of their exclusive coordination authority to include the previously shared frequencies.

Nevertheless, the Commission, with minimal explanation and without adequate justification, amended Section 90.35(b) of its Rules, stating:

> "8. ... API suggests that the Commission adopt 'protected contour' interference protection for stations on former Petroleum Radio Service frequencies that were assigned on a shared basis [footnote omitted]. The Commission rejects API's suggestion, *inter alia*, because the issue of whether to provide protected contours (*i.e.* exclusivity) to Part 90 licensees generally, is the subject of another aspect of this proceeding [note omitted] and may well be implicated in our implementation of the 1997 Budget Act.[note omitted] Consequently, the Commission considers the issue of protected contours to be outside of the scope of the instant *Second MO&O*.
>
> 9. However, the Commission is persuaded that API has raised a legitimate safety issue concerning the frequencies that were assigned to the former Petroleum Radio Service on a shared basis prior to consolidation. [note omitted] The Commission also believes that comparable treatment should be afforded to frequencies that were previously assigned on a shared basis to the former Power Radio Service and Railroad Radio Service. [note omitted] Accordingly, the Commission is now requiring that frequencies that were either assigned on a primary basis, in the First R&O, to any of these former three services (i.e., the Petroleum, Power and Radio services) or that were shared, on a primary basis, prior to the First R&O, between one of these services and another radio service, must be coordinated by API, UTC or AAR, as appropriate. Alternatively, API, UTC or AAR, as appropriate, in its discretion, may determine that such

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> the existing system; for VHF systems employing channels from the 150-174 MHZ band, an applicant's 19 dBu contour may not encroach upon the 37 dBu contour of the existing system; and for systems operated on channels below 50 MHZ, an applicant's 23 dBu contour may not encroach upon the 30 dBu contour of an existing system.
> API Petition for Reconsideration, at page 8.

[8]See Comments of Forest Industries Telecommunications on Petitions for Reconsideration, filed in PR Dkt 92-235 in June 1997, pp 6-7.

> frequencies may be coordinated by any other certified Industrial/Business Pool frequency coordinator, provided that coordinator receives prior written concurrence from API, UTC or AAR, as appropriate [note omitted]."

Thus, the Commission expanded the exclusive authority of the petroleum, power, and railroad coordinators to coordinate their respective portions of the frequencies formerly shared by the former Power, Petroleum, and Forest Products Radio Services. In doing so, the Commission effectively revoked FIT's authority to coordinate practically all of the frequencies FIT has coordinated for its constituent members in the forest products industry for over half a century, as well as the former land transportation shared frequencies. The Commission apparently gave no consideration to the impact of its decision on FIT or on the forest products industry. Furthermore, the Commission did not take into account the fact that FIT, UTC, and API have successfully coordinated the very same frequencies for over half a century. The Commission offered no reasonable explanation, nor indeed any explanation, why the coordination performed by FIT, API and UTC coordinators of the same shared frequencies for over half a century now raise significant safety issues.

II. The Commission's Revision of Section 90.35(b) Was Arbitrary and Enacted in Violation of the APA.

Section 553 of the Administrative Procedures Act, 5 U.S.C. 553, requires federal agencies to give notice and an opportunity to submit comments before they may adopt, amend, modify or repeal a rule. See *American Hospital Association v. Brown*, 834 F. 2nd 1037, 1044 (D.C. Cir. 1987). Here, the Commission, amended Section 90.35(b)

substantially without giving notice nor affording a reasonable opportunity to FIT and to other interested parties to submit comments on that amendment.

The change to Section 90.35(b) is not interpretative, procedural, or a statement of general policy. It is substantive and substantial. It removed over 170 frequencies from the current pool of frequencies that may be coordinated under the current, competitive frequency coordination system. The decision denies applicants desiring to use one or more of those frequencies the right to choose among the current, competing coordinating entities. The change revokes FIT's and the other affected coordinators' authority to coordinate applications for the frequencies in question. In short, the amendment to Section 90.35(b) is the type of rule making to which the prior notice and comment requirements of the APA apply. Cf. *American Hospital Association*, *supra*, at 1044. The amendment was not within the scope of any proposals in the record on which the Commission's decision was based. It was not proposed in any petitions for reconsideration, nor in any of the comments on these petitions. It was not requested by API, UTC, AAR, nor by AAA. It was not within the scope of nor a reasonable response to API's petition for reconsideration. API merely asked only for the opportunity to concur on applications for systems that would place an interfering signal within the service area of existing petroleum systems.[9] The Commission denied API's request and adopted instead the far reaching amendment to Section 90.35(b) at issue here:

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[9]See API's Petition for Reconsideration at p. 8.

giving exclusive coordination authority over formerly shared frequencies, not only to API, but to UTC, AAR and to the AAA.

In sum, neither FIT nor any other interested party had reasonable notice of the Commission's intention to modify Section 90.35(b) in the manner and to the extent it was amended. Therefore, the amendment was adopted in violation of the Administrative Procedure Act and, therefore, it is arbitrary and unlawful. However, in reconsideration of this action, the Commission should not perform a *post facto* justification of its revision to Section 90.35(b), but rather, should seriously revisit the issues involved in this matter, in light of the harm the revision will impose on the forest products industry, and in light of the availability of other less extreme alternatives which accomplish the goal of protecting petroleum, power and railroad land mobile systems while promoting the goal of competitive coordination of frequencies. In the alternative, the Commission should set aside its decision at issue and publish a notice of proposed rule making which would give interested parties adequate notice and opportunity to comment on the revised Section 90.35(b), as required by the APA.

III. The Commission's Revision to Section 90.35(b) Was Unreasonable, Contrary to the Commission's Goal of Competitive Coordination, and Will Harm the Forest Products Industry.

In addition to violating the notice requirements of the APA, the Commission's revision to Section 90.35(b) was also unreasonable and unsupported by the record. Furthermore, the revision is contrary to the stated goal in this proceeding of promoting competitive coordination of frequencies. The revision will also substantially harm the forest products industry.

As previously noted, the only pertinent proposal before the Commission was API's petition for reconsideration,[10] which merely sought a degree of protection for existing petroleum radio systems. The Commission's rejection of that proposal, which would have accommodated the needs of the petroleum industry, was unreasonable. The Commission rejected API's proposal not because it was impractical, opposed, or inconsistent with the public interest but because, according to the Commission, "...the issue of whether to provide protected contours (i.e. exclusivity) to Part 90 licensees generally is the subject of another aspect of the proceeding...." *See Second MO&O,* Par. 8. However, API did not propose protected service contours for the purposes of exclusivity. It merely proposed the use of service and interfering contours for the sole purpose of determining whether the concurrence of the petroleum coordinator should be required. Thus, the reason given by the Commission for rejecting the API proposed alternative is not logical or relevant.

The unreasonableness of the Commission's decision to deny the API proposal is even more apparent when one considers the fact that the frequencies for which the Commission made the Petroleum and or the Power coordinators the sole mandatory coordinators had been shared for decades by the former Forest Products, Petroleum and Power Radio Services (and some by other services) and have been coordinated,

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[10]The Commission also makes reference to a joint petition for a "freeze", filed by UTC and API in another context, that is, RM-9405. However, the Commission properly concluded that the UTC/API "freeze" petition "...is beyond the scope of the matters contained in the Second Report and Order," and that "...will be resolved separately...." *Second MO&O*, Par 13.

respectively, by FIT, API and UTC very successfully over that time. Furthermore, the Commission also ignored the fact that the petroleum industry is to a large degree regional and, therefore, it does not use heavily, if at all, many of the frequencies involved in many areas of the country. In those areas, where the petroleum industry makes little, if any, use of the frequencies, the API proposal would have given petroleum users protection, while the Commission revision giving exclusive mandatory coordination to the petroleum coordinator would serve no useful purpose.

Furthermore, by taking away shared coordination of formerly shared frequencies, and giving exclusive coordination authority to API, UTC, AAR and AAA respectively, to certain frequencies, while denying any coordination role to FIT and other certified coordinators, the revision to Section 90.35(b) is blatantly contrary to the stated Commission goal in this proceeding of promoting competitive coordination of shared frequencies. *See. e.g., Second Report and Order* at para. 40 ("...[competitive coordination] should result in lower coordination costs and better service to the public. For example, we believe market forces will reduce the time it takes to obtain a coordination thereby allowing users to get on-the-air quicker."); and at para. 34:("...allowing frequency coordinators to serve all eligible users in their respective pool rather than only serving users that meet each radio service's eligibility requirements should minimize, if not eliminate, market entry barriers...."). The benefits of competitive coordination should not be unnecessarily denied to the users of the frequencies at issue herein.

Lastly, the Commission's revision to Section 90.35(b) will impose substantial harm on the forest products industry. Forest products companies will lose a substantial degree of access to the frequencies on which the industry's mobile communications system predominately operate because the Petroleum and the Power coordinators have been given the authority to deny access to those frequencies to non-petroleum, non-utility entitles. See *Second MO&O* at par. 29. Moreover, forest products industry companies will lose the option they now have to chose FIT to coordinate their applications, as they have for nearly fifty years, or to chose any of the other competitive coordinators. Other industries and businesses will lose a degree of access to those frequencies (again, because the mandatory coordinators will have the authority to deny coordination requests for those frequencies) and will lose the benefits of competitive coordination with respect to the 170+ frequencies involved.[11]

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[11]FIT will also be harmed by the revision to Section 90.35(b) in the following ways. First, FIT will lose a substantial portion of the revenues it now earns from its coordination services and those losses would not be recoverable. Thus far, most of FIT's revenues for coordination in the past two years, have been generated by coordination services involving the frequencies formerly shared with the petroleum and with the utilities industries. According to FIT's own records, during the past two years, nearly 93% of the applications of its members involved the previously shared frequencies. The *Second MO&O* revokes FIT's authority to coordinate those frequencies and eliminates that source of FIT's coordination income. Second, FIT will very likely lose to API or to UTC much of its traditional coordination customer base, the members of the forest products industry. Lastly, FIT stands to lose substantial portion of its membership. Cumulatively, the loss of income, the potential loss of coordination customers, and the potential loss of its membership threatens the viability of FIT as a coordinating entity and as an organization.

IV. The Commission Should Reconsider its Revision of Section 90.35(b), and Enact the API Concurrence Proposal, Along With a Prior Notification Requirement.

As was shown above, the Commission's revision to Section 90.35(b) was unreasonable and will harm the forest products industry. Thus, FIT continues to support API's proposal, and urges the Commission to reconsider its prior action, and instead adopt the API proposal. Such a proposal has the benefits of retaining competitive coordination of frequencies, and avoiding harm to other potential users of the shared frequencies, while the proposed concurrence requirement will provide additional protection to petroleum industry land mobile communications facilities.[12] In addition, if the Commission prefers, it could also adopt a prior notification requirement that would further protect Petroleum, Power and Railroad Radio Service frequencies, without harming the interests of the forest products industry.

FIT proposes the following: For users who seek to coordinate a facility using a frequency at issue herein, the coordinator would be required to provide 10 days notice to the UTC, API or AAR respectively, prior to filing the application at the FCC. The prior notification must contain all relevant coordination information. Given such prior notification, if the UTC, API or AAR believes that a proposal will interfere with an existing power, petroleum or railroad user, the coordinators can work together to resolve the matter. If the matter cannot be resolved between the coordinators, then the

[12]If the Commission continues to believe that comparable treatment should also be afforded to the utility and railroad industries, the concurrence mechanism proposed by API could also be applied to formerly exclusive Power and Railroad Service frequencies.

coordinator filing the application with the Commission must state that fact in the application.

V. Conclusion

The Commission should reconsider its revision of Section 90.35(b) in the *Second MO&O*. That revision was arbitrary and enacted without proper notice, and is inconsistent with the stated Commission goal of providing competition in the coordination of shared frequencies. Furthermore, the revision was unnecessary to accomplish the goal of protecting petroleum, power and railroad mobile communications facilities, in light of the availability of other less extreme alternatives. The Commission should adopt the concurrence proposal of API, together with the prior notification proposal suggested above.

WHEREFORE, FIT requests that the Commission reconsider its revision to Section 90.35(b) of the rules, as enacted in the Second Memorandum Opinion and Order in this proceeding.

Respectfully submitted,

FOREST INDUSTRIES TELECOMMUNICATIONS

By 

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July 16, 1999

CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, hereby certify that on this 16th day of July, 1999, copies of the foregoing *Petition for Partial Reconsideration* were served on the parties listed below by hand delivery or first class mail:

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